

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN  
GREEN BAY DIVISION**

APPLETON PAPERS INC. and	)	
NCR CORPORATION,	)	
	)	
Plaintiffs,	)	
v.	)	
	)	<b>Case No.: No. 08-CV-00016-WCG</b>
GEORGE A. WHITING PAPER	)	
COMPANY, ET AL.,	)	<b>(Consolidated with Case No. 08-CV-0895)</b>
	)	
Defendants.	)	
	)	
	)	

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**RESPONSE OF THE UNITED STATES TO PROPOSED FINDINGS OF  
FACT SUBMITTED WITH PLAINTIFFS'  
MOTION FOR SUMMARY JUDGMENT**

The United States, a third-party defendant in Case No. 08-00016 and a defendant in Case No. 08-0895, submitted a response to Plaintiffs' Motion for Summary Judgment on Phase I. (Dkt. 573, 576, 577). For reasons stated in the United States Opposition to Plaintiffs' Motion for Summary Judgment, the United States believes that Plaintiffs are not entitled to summary judgment. If the Court disagrees, the United States seeks an opportunity to conduct additional discovery before responding to Plaintiffs' arguments pursuant to Rule 56(f) of the Federal Rules of Civil Procedure. The United States does cite certain factual material in its brief responding to Plaintiffs' Motion, however, and because LR. 56.2(b) and (d) require parties to support the factual assertions in their briefs with reference to Proposed Findings of Fact, the United States sets forth the following responses to Plaintiffs Proposed Findings of Fact (Dkt. 577).

If the United States were granted leave to seek additional discovery related to Plaintiffs motion, there could well be additional disputed facts. At this point, however, the United States disputes Plaintiffs proposed finding of fact #35, #36 and #38 based on the following:

1. Though the United States Environmental Protection Agency (“EPA”) did allege in its November 2007, UAO that NCR and API were liable as successors to two corporate predecessors – Appleton Coated Paper Company and Combined Paper Mills, Inc., EPA also alleged that “NCR and API and their corporate predecessors have owned and/or operated two paper production facilities in the Fox River Valley: one located at 825 E. Wisconsin Avenue in Appleton, Wisconsin (the ‘Appleton Facility’) and another located at 540 Prospect Street in Combined Locks, Wisconsin (the ‘Combined Locks Facility’).” UAO ¶ 7(a)(iii) (Exhibit A).
2. EPA’s allegations go beyond mere successorship. EPA alleged that (1) Combined Paper Mills, Inc. became a wholly-owned subsidiary of NCR in 1969, and that both before and after that acquisition, Combined Paper Mills, Inc. owned and/or operated the Combined Locks Facility; and (2) Appleton Coated Paper Company became a wholly-owned subsidiary of NCR in 1970, and both before and after that acquisition, Appleton Coated Paper Company owned and/or operated the Appleton Facility. Both of those facilities produced PCB containing NCR paper and both facilities discharged PCBs to the Fox River when the facilities were operated by NCR subsidiaries. The Combined Locks Facility also discharged PCBs in connection with its reprocessing of PCB-containing wastepaper. Appleton Coated Paper Company was merged into Combined Paper Mills, Inc. in 1971, and the resulting entity changed its name to Appleton Papers, Inc., which remained a wholly-owned subsidiary of NCR. In 1973, Appleton Papers, Inc. merged into NCR and became known as the Appleton Papers Division of NCR. API later acquired the assets of NCR’s Appleton Papers Division (including the Appleton Facility and the Combined Locks Facility) and API assumed

relevant liabilities in connection with that asset purchase. November 2007 UAO ¶¶ 7(a)(v)-7(a)(x) (Exhibit A).

3. Evidence shows that the Combined Locks Facility discharged PCBs into the Fox River not only prior to the time it was owned by an NCR subsidiary, but also after NCR bought the company that owned that Facility (in 1969), and after that Facility became owned by NCR itself (in 1973). See Technical Memorandum 2d: Compilation and Estimation of Historical Discharges of Total Suspended Solids and Polychlorinated biphenyls from Lower Fox River Point Sources at NCR-FOX-394525; NCR-FOX-394637 (Exhibit C). The data at NCR-FOX-394637 shows that there were measurable PCB levels in the effluent from the Combined Locks Facility in 1974 – after the corporate subsidiary that owned and operated the Combined Locks Facility had merged into NCR. NCR-FOX-394637. The data at NCR-FOX-394646 shows mass estimates of PCB discharges from the Combined Locks Facility for each year from 1954 to 1997, including a high of 3153.5 pounds of PCBs discharged in 1970, and discharges of 110.9 pounds of PCBs in 1974, 59.3 pounds of PCBs in 1975, and a spike of 7.6 pounds of PCBs discharged as late as 1985. Additional documents produced by NCR identify “NCR Appleton paper Div – Combined Locks” as a continuing source of PCB discharges through at least the late 1970s. See NCR-FOX-328209-11 (Exhibit D). These documents demonstrate that the Combined Locks facility was discharging PCBs both before and after it was directly owned and operated by NCR, and create an issue of fact as to whether Plaintiffs’ liability is based solely on their status as successor corporations.

4. Evidence on Plaintiffs' liability is not yet fully developed with respect to the parties' discharges, and it would be premature to make a conclusion of law based on the preliminary allegations set out in EPA's UAO.

Dated: Sept. 30, 2009

Respectfully Submitted,

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Acting Assistant Attorney General  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on September 30, 2009, the foregoing document:

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was filed electronically with the Clerk of the Court using the Electronic Court Filing System,  
which will send electronic notification of said filing to the attorneys of record/parties who have  
registered as CM/ECF participants.

s/ Matthew R. Oakes

MATTHEW R. OAKES